

May 23, 2016

Reference Number: 16-0016

Philistine Ferrand, DBE Liaison Officer
Louisiana Unified Certification Program
P.O. Box 20007
New Orleans, Louisiana 70141

Dear Ms. Ferrand:

L.A. Fabrication, LLC (L.A.) appeals the Louisiana Unified Certification Program's (LUCP's) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation).

In the Denial Letter dated August 5, 2015, LUCP cites the following grounds¹ for denying certification:

- 1) LUCP determined that "the disadvantaged owner" does not own at least 51% of L.A., §26.69(b);
- 2) The disadvantaged owner's capital contribution originated from joint/marital funds and investments with her "non-eligible" husband and co-owner, §26.69(i);

We have carefully considered the full administrative record and determine that LUCP's decision is unsupported by substantial evidence or inconsistent with the procedural and substantive provisions of this part concerning certification. LUCP evidently failed to consider the fact that both owners of the firm are disadvantaged. There is, consequently, no adverse impact on the majority interest or capital contributions by virtue of husband and wife having made separate capital contributions, or by virtue of the funds being marital property. (LUCP did not challenge the 49% owner's presumed disadvantaged status.) The denial is therefore unsupported by substantial evidence and is inconsistent with the underlying certification provisions. Accordingly, we reverse and direct LUCP to certify L.A. without delay.

Applicable Regulation Provisions

§26.61(a) provides:

¹ The certifier also cited §26.69(a) in the Denial Letter. LUCP did not explain their rationale per §26.86(a). We therefore decline to address this ground on Appeal.

“In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.”

§26.61(b) provides:

“The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.”

§26.61(e) provides:

“You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.”

§26.63 provides in pertinent part:

“(a)(1) If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (see §26.61(c)), you have a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group.

(2) You must provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence as outlined in paragraph (b) of this section.”

§26.67(b) provides in pertinent part:

“Rebuttal of presumption of disadvantage. (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

...

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.”

§26.67(a) provides:

“Presumption of disadvantage. (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, *Hispanic Americans*, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized

certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.” (Emphasis added.)

§26.69(a) provides:

“In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.”

§26.69(b) provides:

“To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.”

§26.69(i) provides:

“You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.”

§26.86(a) provides:

“When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.”

§26.89(f)(2) provides:

“If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.”

§26.89(f)(6) provides:

“The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.”

§26.89(g) provides:

“All decisions under this section are administratively final, and are not subject to petitions for reconsideration.”

Operative Facts

L.A. is a metal fabrication job shop providing custom metal fabrication, welding and installation services (Uniform Certification Application (UCA) dated June 14, 2015 at 5). The firm was established on May 1, 2007. Id. L.A. is a limited liability company of which Principal Sherry T. Amberson is the 51% majority owner. Id. Her husband, Laurence R. Amberson, the Master Fabricator owns 49% of the firm and is of Hispanic descent. Id. at 8. Both disadvantaged owners contributed funds from their joint personal savings account and 401K (On-Site Review Report (OSRR) dated July 29, 2015 at 3). In addition, both owners further specify that they used earnings from their previous employment and a business loan from Chase as capital contribution. Id. at 4.

The Denial Letter indicates that L.A. must be at least 51% owned by socially economically disadvantaged individuals. It further states that the firm's application listed “the socially economically disadvantaged individual as having 51% ownership and her non eligible husband as having 49% ownership.” Id. at 3. Further, “there was not sufficient documentation provided supporting the claim of 51% ownership. Proof of initial capitalization was provided that stated personal funds were used for initial start-up.” Id.

In the Appeal Letter dated October 12, 2015, Sherry T. Amberson points out that Louisiana is a community property state and that she and her husband have separate checking and 401(k) accounts. She indicates that most of her financial contributions to the company can be traced

back to her. The Record does show two checks written to the firm in the amount of redacted² and \$redacted³ originating from Sherry T. Amberson's personal checking account. She reiterates the assertion in the UCA that her husband, Laurence R. Amberson, is Hispanic American. *Id.* at 2.

Discussion and Decision

Ownership

Substantial evidence indicates that L.A. is entirely owned by disadvantaged individuals. The Department finds no issue with percentages of ownership or marital property as a capital contribution. *See* §§26.69(b) and (i).

LUCP indicates that the Ambersons' capital contributions came from 401K investments and personal funds. They allege that since marital contributions were used from their joint funds, this was contrary to §26.69(i)(1) and (2) affecting the overall ownership percentages between the two owners. LUCP asserts that the joint funding for the firm compromised Sherry T. Amberson's majority ownership, rendering both owners owning equal amounts of the firm or 50/50 ownership. *See* §26.69(b). Sherry T. Amberson would therefore not own the majority of the firm and her "non-eligible" husband would own the firm equally with her, ostensibly failing to meet the requirements of §26.69(b).

However, LUCP failed to consider that Laurence R. Amberson is Hispanic, and is presumptively disadvantaged per §26.67(a). It would therefore make no difference whether Sherry T. Amberson owns a majority of the firm. L.A. is 100% owned by presumed disadvantaged persons, collectively. As a result, the respective percentages in the firm and origin of capital contribution (whether from one marital account or another), would not matter. LUCP did not challenge or rebut Laurence R. Amberson's disadvantaged status per §26.63(a).⁴ If LUCP suspected that Laurence R. Amberson did not belong to a presumptively disadvantaged group, the certifier should have proceeded to challenge his status. Since both owners are presumed disadvantaged, the firm is 100% owned by disadvantaged individuals absent a rebuttal of disadvantage under §26.67(b), and there was none. L.A. has demonstrated, by a preponderance of the evidence, that disadvantaged individuals wholly own the firm. We therefore reverse LUCP's decision in accordance with §26.89(f)(2).

Conclusion

The Department reverses LUCP's decision under §26.89(f)(2) as unsupported by substantial evidence or inconsistent with substantive or procedural provisions relating to certification and directs LUCP to immediately certify L.A. as a DBE.

² Check Number 5718 dated April 22, 2014 from Chase Bank is located in the Record.

³ Check Number 5708 dated August 31, 2013 from Chase Bank is located in the Record.

⁴ The Record does not indicate that LUCP reviewed his membership in a presumptively disadvantaged group or required Laurence R. Amberson to provide proof that he is Hispanic American. LUCP did not provide any written explanations questioning his status. *See* §26.63(a).

This decision is administratively final and not subject to petitions for reconsideration. Thank you for your continued cooperation.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division

cc: L.A.